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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 445

TAGE E. PEARSON, *Petitioner*,

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, an Ohio corporation, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion and order of the District Court entered April 23, 1963 (Appendix A to Petition, pp. 1a-7a) dismissing Counts I and III of the amended complaint for failure to state a claim, and the order of the District Court entered October 22, 1963 (App. B. to Pet., p. 8a) granting summary judgment for defendant on Count II and entering judgment on Counts I-III of the amended complaint are unreported.

The opinion and decision of the United States Court of Appeals for the Seventh Circuit (App. C. and D to Pet., pp. 9a-15a) affirming the judgments of the District Court are officially reported at 332 F.2d 439 (7th Cir. 1964).

JURISDICTION

The statement of jurisdiction contained in the petition (Pet., p. 2) is accurate.

QUESTIONS PRESENTED

1. Whether the controversy is moot because of the death of plaintiff, as more fully set forth at page 5 *infra*.

2. Whether under the law of Indiana plaintiff's forbearance from the termination of his employment and his unemployability elsewhere by reason of the passage of time constitute adequate consideration to support an alleged implied permanent employment contract and cause it to be other than one terminable at the will of either party.

3. Whether under the law of Indiana an actionable conspiracy can occur between a corporation and an agent of the corporation acting within the scope of his employment where the alleged object of the conspiracy is to induce the corporation to terminate a contract terminable at will to which it is a party.

4. Whether under the law of Indiana the allegations that certain agents of defendant committed negligent or otherwise tortious acts in the course of their employment resulting in defendant's termination of plaintiff's employment under a contract terminable at will, without the allegation of the breach of any duty independent of said contract, state a claim against defendant in tort.

STATEMENT OF THE CASE

Facts

This action was brought against defendant in the District Court on the basis of diversity of citizenship jurisdiction to recover damages for a breach of an alleged im-

plied contract of permanent employment, for conspiring with its agent to interfere with said implied contract, and for certain negligent and willful acts which resulted in the termination of said implied contract.

Count I of the amended complaint alleges that plaintiff was employed by defendant under an implied contract of employment in which defendant agreed "to permanently employ" plaintiff at wages and salaries and incidental benefits to be agreed upon from time to time, that in consideration for said compensation plaintiff continued in defendant's employ for 28½ years, that by reason of the passage of said period of time plaintiff's suitability for employment elsewhere has been destroyed, and that defendant breached said implied contract of employment by terminating plaintiff's employment (Record, pp. 6-8).

Count II of the amended complaint, in addition to realleging the above allegations, claims that defendant negligently, carelessly, willfully and tortiously, in conspiracy with another, interfered with the said contractual relationship causing plaintiff to be dismissed from his employment (Rec., pp. 8-10). In answer to interrogatories plaintiff stated that the object of said conspiracy

> "... was to interfere with and obstruct the contractual relationship existing between plaintiff and defendant so as to induce the defendant to breach the same and to discharge plaintiff." (Rec., p. 20).

Plaintiff does not deny that the person with whom defendant is alleged to have conspired was a medical doctor acting as agent of, and within the terms of his employment with, defendant who pursuant to the terms of his employment examined plaintiff (Rec., pp. 38-42).

Count III of the amended complaint alleges that said medical doctor while acting within the scope of his employ-

ment carelessly and negligently examined plaintiff and advised defendant that plaintiff was able to return to work when in fact he was not able to resume his duties, and defendant in reliance upon the negligent misrepresentation of said medical doctor directed plaintiff to return to work when plaintiff was not physically able to do so. It further alleges that an unknown agent of defendant negligently, willfully and intentionally misrepresented that plaintiff voluntarily terminated his employment when such agent knew or had reason to know that such was not the fact, and that because of the foregoing misrepresentations plaintiff was wrongfully deprived of his employment (Rec., pp. 10-12).

Action of the Courts Below

On defendant's Motion, the District Court dismissed Counts I and III of the amended complaint for failure to state a claim (App. A. to Pet., pp. 1a-7a). Applying the law of Indiana, the court held that because Count I alleged no additional consideration beyond the services rendered by plaintiff, the contract therein described was terminable at will. It further ruled that Count III alleged that defendant made negligent or willful and intentional representations to itself and failed to allege the breach of a duty fixed by law independent of the duties arising out of the alleged employment contract and therefore did not state a cause of action. Defendant's Motion to Dismiss was denied as to Count II.

On defendant's subsequent Motion for Summary Judgment, based on the pleadings, plaintiff's answer to interrogatories, and affidavits of defendant's medical doctor (the alleged co-conspirator) and supervisor of industrial relations (Rec., pp. 6-41), the District Court entered judgment for defendant on Count II (App. B to Pet., p. 8a).

The Court of Appeals affirmed the judgment of the District Court holding that (a) detriment incurred by plaintiff by reason of his prolonged employment with defendant without more was not sufficient to support the alleged permanent employment contract and make it other than one terminable at will, (b) (i) a conspiracy was not here present, defendant's co-conspirator being an agent of defendant acting in its behalf, and (ii) the object of the alleged conspiracy was not unlawful, the defendant having a legal right to terminate plaintiff's alleged employment contract at will, and (c) an actionable tortious breach of duty was not alleged, defendant's agents acting on its behalf merely doing what defendant had a right to do under the terms and conditions of plaintiff's employment.

DEATH OF PLAINTIFF

Since the filing of his petition, plaintiff has died. Therefore, unless plaintiff's legal representative is substituted as the complaining party the action would appear to be moot. See Burns Ind. Stat. Ann. Sec. 2-403 (Supp. 1964).

ARGUMENT

I

THE DECISION SOUGHT TO BE REVIEWED DECIDES QUESTIONS OF INDIANA LAW WHICH ARE NEITHER NOVEL NOR UNSETTLED AND ACCORDS WITH EXISTING INDIANA AND GENERAL LAW

No federal or state constitutional or statutory issues, or questions of general federal law, or principles related to federally created rights are involved in the petition (See Pet., pp. 3, 6, 20). Federal jurisdiction was obtained in the District Court by diversity of citizenship: the common law of the state of the forum, Indiana, is here applicable, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

It is apparent from the petition and the opinions below that the issues raised by the merits of this action concern solely common law questions which are neither novel nor unsettled under Indiana or general law.

With respect to Count I, the courts below applied the settled rule that services to be performed (and the passage of time inherent therein) are not consideration sufficient to support a permanent employment contract. See, *e.g.*, *Montgomery Ward & Co., Inc.* v. *Guignet*, 112 Ind. App. 661, 45 N.E.2d 377 (1942), reciting the Am. Jur. statement of the rule (35 Am. Jur., *Master and Servant* Sec. 24 (1941), and *Pennsylvania Co.* v. *Dolan*, 6 Ind. App. 109, 32 N.E. 802 (1892) (Pet., pp. 10-11) applying the rule. See also, Annot., *Contract for Permanent Employment* 35 A.L.R. 1432 (1925), supplemented, 135 A.L.R. 646 (1941). Plaintiff urges the Court to review the decision below for the purpose of adopting the novel and arguably unworkable rule of state law formulated in his petition (See Pet., p. 6).

With respect to Count II, the courts below applied the settled rule under the circumstances here that defendant could not conspire with its agents and that defendant merely terminated an employment contract terminable at will which it had the legal right to do. See *May v. Santa Fe Trail Transportation Company*, 189 Kan. 419, 370 P.2d 390, 395 (1962); *Johnny Maddox Motor Co. v. Ford Motor Co.*, 202 F. Supp. 103, 105 (W.D.Tex. 1960); *The Greyhound Corp. v. Commercial Casualty Ins. Co.*, 259 App. Div. 317, 19 N.Y.S. 2d 239 (1949). See also Annot. *Procuring Breach of Contract*, 26 A.L.R. 2d 1227, 1268-71, 1284-85 (1952). The sole basis of this portion of the petition is that the courts below erroneously applied the law. Plaintiff contends that it was improper to hold that as a matter of law defendant here did not conspire with its own agent. However, he cites no authority or logic to support his assertion. Moreover, although, as plaintiff argues at length, an action might lie for improperly inducing a third party to terminate a contract terminable at will, this case involves a two-party (defendant corporation which can only act through agents, and plaintiff) rather than a three-party situation.

The tort issue raised in Count III of the amended complaint similarly lacks novelty or uncertainty and that Count was properly dismissed under settled law. Plaintiff states in his petition that he is asking for an extension of settled law "to provide further protection of the economic man" (Pet., p. 20). He disagrees with the Court of Appeals' correct ruling that under existing Indiana and general law defendant was free to terminate plaintiff's employment at will and owed no duty to plaintiff independent of the employment contract. See *Federal Life Ins. Co. v. Maxam*, 70 Ind. App. 255, 117 N.E. 801 (1917); *Bruce v. Indianapolis Gas Co.*, 46 Ind. App. 193, 92 N.E. 189 (1910). See also

50 Am. Jur., *Actions* Secs. 50-51 (1944); *Atlantic and Pacific R. Co.* v. *Laird*, 164 U.S. 393 (1896).

It is not the proper role of this Court or any federal court in a case such as this where federal jurisdiction rests on diversity of citizenship to extend or create new rules of state law. See *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 236-37 (1940).

II

THE DECISIONS OF THE LOWER COURTS DID NOT VIOLATE A PROCEDURAL RULE OF THE COURT BY FAILING TO ACCEPT AS TRUE MATERIAL ALLEGATIONS OF FACT SET FORTH IN THE AMENDED COMPLAINT.

The lack of merit in plaintiff's argument on this issue is readily apparent. On a motion to dismiss, well-pleaded *facts* in the complaint are to be taken as true, but not naked conclusions of law. See *Halliburton Co.* v. *Norton Drilling Co.*, 302 F.2d 431, 435 (5th Cir. 1962), *cert. denied*, 374 U.S. 829 (1963); *Ryan* v. *Scoggin*, 245 F.2d 54,57 (10th Cir. 1957); 1A Barron and Holtzoff, *Federal Practice and Procedure* Sec. 350 (1960). Whether plaintiff's employment contract was terminable at will or was permanent involves determinations of law, not fact. The courts below correctly applied established rules of law to the facts alleged to conclude that the contract alleged was, as a matter of law, a contract terminable at will. The rule of *Clark* v. *Uebersa Finanz-Korporation, A.G.*, 332 U.S. 480 (1947) has not been violated.

CONCLUSION

For the reasons that the decision sought to be reviewed does not, within the meaning of Rule 19(1)(b) of the Court's Rules, decide a state or territorial question which is important, novel or unsettled, or reach a result which is in conflict with applicable state or territorial law, and does not so far depart from the accepted and usual course of judicial proceedings as to call for the Court's power of supervision, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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